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Supreme Court of the United States

OCTOBER TERM, 1964

No. 431

THOMAS D. GEORGE, JOHN C. WINTHROP and CHARLES F. FINK,

Petitioners,

against

DOUGLAS AIRCRAFT CO. INC.,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Question Presented

The only question presented is whether or not this personal injury action involving no serious State question should be reviewed by the Supreme Court of the United States.

In an attempt to give a semblance of color to the contention that a reviewable question is presented, the entire first point of the petitioners' brief contends that the Court below is *contra* to the case of *Goldberg* v. *Kollsman Instrument Co.*, 12 N. Y. 2d 432, 191 N. E. 2d 81 (1963), which case, they contend, would dictate that this cause of action arose in Florida.

The illusory quality of this contention is readily apparent on reading the opinion below and the *Goldberg* case.

Firstly, the *Goldberg* case did not involve issues presented here but merely indicated a tendency in New York to classify these actions as "tort" actions.

In any event, the Court below considered that case at length and, in the latter part of its opinion, assumed *arguendo,* that the cause did arise in Florida as the petitioners contend.

Even on this assumption, they held it would be barred under that State's laws, as well as those of California.

Statutes Involved

New York Civil Practice Act—

"§ 13. Limitation where cause of action arises outside of state.

Where a cause of action arises outside of this state an action cannot be brought in a court of this state to enforce such cause of action after the expiration of the time limited by the laws either of this state or of the state or country where the cause of action arose, for bringing an action upon the cause of action, except that where the cause of action originally accrued in favor of a resident of this state, the time limited by the laws of this state shall apply. * * *

(Effective Sept. 1, 1949; counterpart section found in new Civil Practice Law and Rules § 202, effective Sept. 1, 1963.)

California Code of Civil Procedure, Section 340(3)—

Section 340, subdivision 3 of the California Code of Civil Procedure provides that actions for personal injuries are barred unless commenced within one year after the date of injury."

California holds that regardless of the theory upon which plaintiff relies, whether it be breach of contract or of

warranty, if he is suing for personal injuries, his action must be commenced within one year after the date of injury. *Rubino* v. *Utah Canning Co.*, 123 Cal. App. 2d 18, 266 P. 2d 163 (1954); *Gosling* v. *Nicholas*, 59 Cal. App. 2d 442, 139 P. 2d 86; *Lai Wam Chin Mock* v. *Belfast Beverage, Inc.*, 193 Cal. App. 2d 770, 14 Cal. Rptr. 602 (1961).

Florida Statutes

"§ 95.11 Limitations upon actions other than real actions.

Actions other than those for the recovery of real property can only be commenced as follows:

• • •

(3) Within five years.—An action upon any contract, obligation or liability founded upon an instrument of writing not under seal.

(4) Within four years.—Any action for relief not specifically provided for in this chapter.

(5) Within three years.—

• • •

(c) And an action upon a contract, obligation or liability not founded upon an instrument of writing, including an action for goods, wares and merchandise sold and delivered, and on store accounts."

Statement

Petitioners, all citizens and residents of the State of Texas, brought suit against the defendant, Douglas Aircraft Co. Inc. a Delaware corporation for personal injuries suffered by them on March 25, 1958, at Miami, Florida.

The essential facts involved in the motion for summary judgment in the Court below, were not disputed.

The plaintiffs were the pilot, co-pilot and flight engineer of an aircraft owned and operated by Braniff Airways, Inc., which crashed shortly after take-off, from Miami, Florida, on March 25, 1958.

The suit was brought by these three plaintiffs on March 25, 1963, when a complaint was filed in the U. S. District Court, for the Southern District of New York, on the fifth anniversary of the accident.

Douglas was and still is a well-known aircraft manufacturer, engaged principally in the manufacture of the air frames and appurtenant parts for commercial aircraft.

On February 2, 1955, Braniff and Douglas had entered into an elaborate formal written agreement known as a "Purchase Agreement", for the purchase and sale of seven Douglas Model DC7C aircraft.

Douglas did not manufacture the engines (AA 30a), but did install them aboard the various aircraft.

It was not disputed that the aircraft and the engine involved had been manufactured and delivered to Braniff in California, more than eleven months before the date of the accident. Braniff had been using the planes and engines in its airline business since delivery.

The complaint was based upon allegations that the "defendant impliedly and expressly represented and warranted that said DC7C aircraft and said model engines would not fail in performance" (AA 10-a, Para. 10 of the complaint); "that the said aircraft, and more particularly, said engines, were not fit for the purpose for which it was intended" (AA 10-a).

The complaint further alleged that each of the plaintiffs was a "third party beneficiary to the above mentioned implied and expressed representations and warranties and a person to whom defendant impliedly represented and warranted that said aircraft and engines were good

and merchantable quality, free from defects and fit for commercial travel . . ." (AA 10-a).

The written contract contained no such warranties and in fact excluded them (Purchase Agreement, Record on Appeal, 36-101).

The petitioners had, some years ago, brought an action arising out of this accident, in the District Court of Florida, against the U. S. Government, by reason of the alleged negligence on the part of the Miami Airport tower personnel, in that said personnel did not warn them immediately, after observing a fire in one of the engines, during take-off.

The contract between Braniff and Douglas, which petitioners claim as the source of their rights, provided that only the warranties, obligations and liabilities expressly set forth in the purchase agreement, were to be applicable, and expressly excluded all implied warranties. The portion printed in Petitioners' Appendix (31a) did not refer to the engines which were not manufactured by Douglas. Moreover all warranty periods had expired since the delivery of the engine (pp. 22, 23, Purchase Agreement, Record, pp. 36-101).

Douglas moved for summary judgment, on the ground that the statute of limitations had expired on this breach of warranty action, particularly the limitations period of California, where the airplane was made, contracted for and delivered in 1957, or that of Florida, where the accident had occurred, one or the other of which was made applicable by New York's "borrowing" statute, Civil Practice Act, Section 13.

The petitioners contend that the Florida statute is the pertinent one, but that their claim is not barred by its five year period for actions on a written contract.

The District Court held that the cause of action arose in California, and was barred by that state's one year statute of limitations for tort or contract actions.

The U. S. Court of Appeals, in an extensive and well-reasoned opinion, affirmed the decision of the District Court.

REASONS FOR DENYING WRIT

POINT I

This case does not present a question which warrants a second appellate review by the United States Supreme Court.

This action is an ordinary personal injury action for breach of "implied" warranty, which was instituted five years after the airplane on which the plaintiffs were passengers crashed.

The petitioners' Statute of Limitations problems are of their own making and this case certainly represents a last ditch effort on their part to sustain a baseless claim against the respondent, who did not manufacture the engine in this plane that crashed.

At least as early as 1960, these petitioners were represented by these same attorneys, and were actively pursuing personal injury actions in Florida at a time and place where no limitations problems would have been encountered. Their action in Florida was dismissed on September 21, 1961 after trial. *Braniff Airways, Inc.* v. *United States*, 203 F. Supp. 602 (D. C. Fla. 1961).

That they did not there sue Douglas (or Curtiss-Wright, the manufacturer of the engine), eloquently reflects the tenuousness of claimed liability.

Also apparent is the blatant "forum shopping" in which they are now indulging.

Realizing that their action in tort or implied contract was barred in California and Florida, they brought this

action in New York, perhaps hoping that removing the case geographically from the States whose laws would apply might permit the avoidance of those States' decisions on the subject.

Patently this case presents no federal question nor is there any conflict of decision among the Circuit Courts on the issues presented.

The petitioners are all citizens and residents of Texas, and Douglas is a Delaware corporation. New York has absolutely no contact with the case, except for the fact that it was brought there.

In every action brought in New York, that State does have one interest, and that is to see that its courts are not being used by "forum shoppers" to enforce stale claims barred in the jurisdictions in which they arose. This is what the District Court, in its decision below, did here, and what the Circuit Court of Appeals thoroughly reviewed and affirmed in its opinion below.

However, there is certainly no matter involving serious State policy or a question affecting the public interest of the State involved. The Court routinely construed a New York statute in a conflict of laws situation, and decided what the New York Courts would do in this case. As will be pointed out in the following point heading, their decision was amply supported by decisions of New York's highest Court.

The petitioners, in an attempt to create an aura of confusion and error, claim that the decision of the Court below was in conflict with the case of *Goldberg* v. *Kollsman Instrument Corp.*, 12 N. Y. 2d 432, 191 N. E. 2d 81 (1963).

There are several fallacious aspects to this argument.

Firstly, there was no statute of limitations problem raised in the *Goldberg* case, so that it is of little help in determining whether the case at bar was prescribed by the statute of limitations.

Secondly, the Court was well aware of the *Goldberg* case in arriving at its decision and in fact referred to it at length in its decision below.

But, the New York Court of Appeals expressly avoided the question presented in the instant case, i.e., "where the cause of action arose" in the *Goldberg* case, when they stated that "it really makes no difference whether California or New York law be applied, since in this respect, both States use the same rules". 12 N. Y. 2d at 436, 240 N.Y.S. 2d at 594. However, the Court below did determine where the cause of action arose in accordance with sound principles of New York law.

In fact, in the *Goldberg* case, the place of manufacture and delivery did not appear in the facts presented to the Court, which made it impossible for them to apply the grouping of contacts theory in that case.

Moreover, even granting the petitioners' contention that the *Goldberg* case was controlling, the effect of that case was to eliminate the classification of actions by passengers against aircraft manufacturers as contract or warranty actions and classify them as tort actions, manifesting an intention to impose "strict tort liability" in such passenger cases. This is evident from the quotation from the *Goldberg* case appearing on page 6 of the petitioners' brief which states that the action is "a tortious wrong suable by a *noncontracting* party whose use of the warranted article is within the reasonable contemplation of the vendor or manufacturer. *Goldberg* v. *Kollsman Instrument Corp.*, 12 N. Y. 2d 432, 436, 191 N. E. 2d 81 (1963).

Thus, the rationale of the *Goldberg* case buttresses rather than weakens the opinion below, since to classify the action as one in tort is to concede that it would be barred by the Florida four year tort statute, as well as every other conceivable tort period of limitations.

From the petitioners' point of view, at best, it may be considered that the decision below as to where this cause

of action arose, was one of first impression on this conflict question.

The petitioners have had the question thoroughly considered by the District Court and thoroughly reviewed by the Circuit Court of Appeals, who are well versed in the law and philosophies of the State in which they sit.

They have presented no cogent reasons for a second appellate review by this Court of an ordinary conflicts of law problem extensively thought out by the Court below.

POINT II

The Circuit Court of Appeals decision that this breach of warranty action arose in California is in perfect harmony with the New York law applicable to such actions.

The petitioners concede that this action comes within the purview of Section 13 of the New York Civil Practice Act applicable on March 25, 1963, which forbade the bringing of an action by a non-resident "arising" outside of New York "after the expiration of the time limited by the laws of the state or country where the cause of action arose".

The crux of the decision in the Court below is that "New York would hold that the plaintiffs' cause of action here arose in California whose one year statute would be a bar."

Now, it is axiomatic that questions pertaining to periods of limitation on bringing an action are procedural questions governed by the law of the forum.

In order to apply Section 13, the Court below first had to decide where the cause of action arose.

In this respect, the petitioners now concede that the New York law as to where a cause of action arises should

be followed, inasmuch as they cite certain New York cases in support of their contention that this cause of action arose in Florida.

At the outset, it must be remembered that the petitioners themselves insist that this cause of action is a contract action for breach of warranty, and that the sole source of their rights is the written contract entered between Braniff and Douglas in California. They deny that their action is based on some obligation not emanating from a written contract.

As a contract action, this case is governed by principles of contract law as opposed to tort principles.

Were the petitioners to contend otherwise, would be to admit that their claim is barred by the four year Florida statute for tort actions, as well as the one year California statute for tort and contract actions.

However, in the face of their classification of their action as one in contract, they choose to ignore the unimpeachable principles of New York law that a breach of warranty action arises at the time the allegedly defective article is delivered to the vendee, irrespective of when the vendee becomes aware of the defect.

Citizens Utility Co. v. *American Locomotive Co.*, 11 N. Y. 2d 409, 184 N. E. 2d 171 (1962);
Kakargo v. *Grange Silo Co.*, 11 A. D. 2d 796, 204 N.Y.S. 2d 1010, appeal denied 11 A. D. 2d 958, 207 N.Y.S. 2d 435 (2d Dept. 1960);
Liberty Mut. Ins. Co. v. *Sheila Lynn, Inc.*, 185 Misc. 689, 57 N.Y.S. 2d 707, aff'd 270 App. Div. 835, 61 N.Y.S. 2d 373 (1st Dept. 1945).

In the *Citizens Utility Co.* case, the New York Court of Appeals held as follows:

"'that where the warranty is as to kind, characteristics, suitability, etc., of the sold article, the limitation

runs from the date of sale and present inability to ascertain quality or condition is irrelevant. *Such is New York law as to the accrual of a cause of action for implied warranty.*" (Emphasis added.) *Id.* at 198.

The airplane in question here was delivered in 1957 in California, more than five years before this action was commenced.

Certainly, in view of the cases above cited, the Circuit Court of Appeals was correctly applying New York law when it held that the plaintiffs' breach of warranty action arose in California, if at all.

The application of the California one-year period of limitation to this case is not only called for by the traditional rules laid down in the *Citizen Utilities Co.*, *Kakargo*, and *Liberty Mut.* cases but is also dictated by the New York "grouping of contacts" theory recently applied in matters of breach of contract and tort actions. This theory has been utilized not only in determining what substantive law is to be applied but it has also been used in determining where a cause of action arose. *Correll* v. *Correll*, 109 N.Y.S. 2d 531 (Sup. Ct. 1951).

In the case at bar, California is clearly the state with the most significant contacts. The contract of which petitioners claim to be third-party beneficiaries, was entered into in California, the delivery of the planes took place in California, and the parties expressly stated in the contract of sale that California law would apply to the contract.

As District Judge Cooper so correctly pointed out, the traditional choice of law views are no longer determinative under the "grouping of contacts" rule which New York has adopted. Thus, the fortuitous circumstances of the plane crash in Florida would no longer determine where this cause of action arose, whether the action be one in tort

or in contract. However, New York's highest court has stated that,

> "Even if the parties' intention and the place of the making of the contract are not given decisive effect they are nevertheless to be given heavy weight in determining which jurisdiction 'has the most significant contacts with the matter in dispute'. Auten v. Auten, 308 N. Y. 155;" *Haag* v. *Barnes*, 9 N. Y. 2d 554, 560, 216 N.Y.S. 65, 69 (1961).

Applying this theory to the plaintiff's cause of action, it is readily seen that California has the most significant contacts with the matter in dispute.

It would clearly be contrary to the policy of the forum state to allow the place of injury, as opposed to the place with the most significant contacts, to be considered as the place where the cause of action arose.

In order to correctly apply the New York Statute of Limitations, the case law of New York and its grouping of contacts philosophy in contract actions dictate the holding that this cause of action arose in California

In the recent Court of Appeals case *Babcock* v. *Jackson*, 12 N. Y. 2d 473, New York's highest court pointed out how unsound is the arbitrary application of a *lex loci* doctrine in tort cases much less in contract cases, in this day and age when modern transportation makes the place of damage entirely fortuitous.

Of course, New York has long since adopted the "grouping of contacts" theory in contract actions.

Hence, applying the grouping of contacts principles in contract or tort actions, the cause of action arose under the laws of the State of California.

Petitioners' difficulty lies in the fact that they simultaneously need this Court to apply a *tort* concept, i.e., that

the *lex loci delictus* applies (no longer valid in New York), while simultaneously maintaining that their action is one based upon a written contract with *tort* statutes of limitations not applicable.

The Court below correctly applied New York's grouping of contacts rationale to the case at bar, when it stated:

> "That court's (New York's Court of Appeals) recent opinion in Babcock v. Jackson, 12 N. Y. 2d 473, 240 N.Y.S. 2d 743 (1963) stated that decision of each choice of law question 'must turn . . . on the law of the jurisdiction which has the strongest interest in the resolution of the particular issue presented' . . . We predict that New York would hold that the plaintiff's cause of action here 'arose' in California whose one year statute would be barred."

In an attempt to avoid the inexorable application of the cases cited above, the petitioners refer to the case of *Goldberg* v. *Kollsman Instrument Corp.*, 12 N. Y. 2d 432, 491 N. E. 2d 81 (1963), in which Chief Judge Desmond of the Court of Appeals did indicate a tendency in New York toward imposing upon the manufacturer of an airplane "strict tort liability".

It is clear that the nature of such a liability is in *tort* and governed by tort principles. There is no hint in its decision that anything but a tort limitation period would apply in such a case.

Since the petitioners deny that theirs is a tort action, it is a complete reversal of position to contend that the *Goldberg* case should be followed to determine where this cause of action arose. If it be assumed that the *Goldberg* case does lead to the conclusion that this cause of action arose in Florida, the petitioners would then by some peculiar paradox revert to their original position and have the Court favor them with a decision that under Florida law theirs is not a tort action but one arising under a written contract.

POINT III

Even if it be assumed that the cause of action arose in Florida, the Court below was correct in holding that under Florida law this action is not one founded upon a written instrument.

As the Court below, correctly pointed out, the contract of sale between Braniff and Douglas contained only three express warranties and limited Douglas' responsibility to correcting them if defects occurred within specified periods, disclaiming any liability for consequential damages.

In fact, the contract contained the following express disclaimer:

> "(E) The warranty provided in this article and the obligations and liabilities of Seller thereunder are in lieu of and Buyer hereby waives all other warranties, guaranties, conditions or liabilities, express or implied arising by law or otherwise (including without limitation any obligation of the Seller with respect to consequential damages) and whether or not occasioned by Seller's negligence and shall not be extended, altered or varied except by a written instrument signed by Seller and Buyer; provided that in the event the provision relieving Seller from liability for its negligence should for any reason be held ineffective, the remainder of this paragraph (E) shall remain in full force and effect."

However, in the face of this express disclaimer, the plaintiffs based their right of action on implied warranties of fitness for use and merchantability.

As the Court below cogently pointed out, "it is simply confusing to consider an obligation which the law imposed irrespective of the intention of the parties or even in direct

contravention of their expressions, as in the same category as a contractual warranty, express or fairly implied."

Here the Court was obviously pointing out the distinction between an obligation imposed by law and an obligation implied in fact from the terms of the written contract.

In the latter instance, an obligation will be implied from the very terms of a contract, which lead one to the conclusion that the parties manifestly intended such an obligation to be part of the contract, although specific reference thereto was not made in the instrument.

Such is not the case here, since the parties manifestly intended that under the written contract there would be no implied warranties.

In this case, the Court below correctly pointed out that:

> "any liability which the plaintiffs can assert on these *pleadings* would be in spite of, rather than, under the terms of the contract. The nature of a manufacturer's liability to third parties, has been recently stated by the Supreme Court of Florida to be an 'undertaking or agreement *attributed by law* to be responsible in the event the thing sold is not, in fact, merchantable or fit for its ordinary use or purpose'. *Green* v. *American Tobacco Co.*, 154 So. 2d 169, 171 (Florida, 1963)." (Emphasis added)

The petitioners fail to comprehend this distinction between an undertaking attributed by law and a contractual obligation implied from the very terms of the contract itself.

In fact, *King* v. *Douglas Aircraft*, 159 So. 2d 108 (Florida Dist. Ct. of App. 1963), a case cited by the petitioners, points up this distinction.

In that case, Douglas moved for summary judgment on the grounds that there was no triable issue of fact as

to their liability, since the engine in question had been overhauled by Braniff and used by Braniff for 3,000 flying hours before the crash.

There was no statute of limitations question raised in that case since the action was timely under another applicable statute.

The Court did hold that an implied warranty theory was applicable.

But, it did not state that such a warranty was implied from the express terms of the contract.

In fact, implicit in the decision is the indication that it was an obligation implied by law.

This is all the more obvious since the Florida Court quoted the *Goldberg* v. *Kollsman Instrument Co.* case, and stated:

> "At least, where an article is of such a character that when used for the purpose for which it is made, it is likely to be a source of danger, to several or many people, if not properly designed or fashioned, the manufacturer, as well as the vendor, is liable for breach of *law implied warranties*, to the persons whose use is contemplated . . ." *Id.*, at pages 10 and 11. (Emphasis added)

Obivously, the Court's reference in the *Goldberg* case, to "law implied warranties" had absolutely no reference to warranties implied from the terms of the contract.

Since the petitioner's claim herein is in spite of the terms of the purchase agreement, and based upon "law implied warranties", it would clearly be "an action upon a contract, obligation or liability, not founded upon an instrument of writing" and within the purview of Section 95.11 (5)(E) of the Florida statute of limitations which prescribes it within three years or Section 95.11(4) which prescribes tort actions within four years.

In attempting to attack the Circuit Court's construction of Florida law, the petitioners cite the case of *Manning* v. *Serrano*, 97 So. 2d 688 (1957), as controlling.

However, that case is clearly distinguishable in that it involved a malpractice action against a physician.

The issue involved there was whether the three year Florida oral contract period of limitations or the four year tort period was applicable in a malpractice action.

There was no written contract between the plaintiff and the physician.

The Florida Court conceded that the plaintiffs in that case had an election to sue on an oral contract theory or on a tort theory.

However, implicit in the Court's holding that the injured party has an election to sue for tort or for the breach of contract, is the basic right to sue on either theory in the first place.

The Court below expressly held here that Florida would hold that the petitioners had no right of action under the written contract and the petitioners cite no Florida case which is contrary to this holding.

Assuming that the petitioners here had an election to sue on the breach of warranty obligation imposed by law, as well as on a tort theory, an obligation imposed by law is literally within the purview of Section 95.11 (5)(E), which provides for a three year prescriptive period.

The essence of the Court's holding in the case at bar as to Florida law, was that the petitioners' suit being in express contravention of the terms of the written contract, could not be considered an action founded upon the written contract.

At best, this is a case of First Impression and not one which calls for review by this Court.

Wherefore, respondent prays that this petition be denied, and that a Writ of Certiorari be refused.

Respectfully submitted.

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